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FEDERAL DEPOSIT INSURANCE CORPORATION

12 C.F.R. Part 330

RIN 3064-AE00

Deposit Insurance Regulations; Definition of Insured Deposit

AGENCY: Federal Deposit Insurance Corporation (FDIC)

ACTION: Final Rule

SUMMARY: The FDIC is adopting a final rule ("Final Rule") that amends its deposit insurance regulations with respect to deposits in foreign branches of U.S. insured depository institutions ("IDI" or "U.S. bank"), which can be found at 12 C.F.R. Part 330, section 330.3(e). The Final Rule clarifies that deposits in branches of U.S. banks located outside the United States are not FDIC-insured deposits. This would be the case even if they are also payable at an office within the United States ("dual payability"). As discussed further below, a pending proposal by the United Kingdom's Prudential Regulation Authority ("U.K. PRA"), formerly known as the Financial Services Authority, has made it more likely that large U.S. banks will change their U.K. foreign branch deposit agreements to make their U.K. deposits payable both in the United Kingdom and the United States. This action has the potential to expose the Deposit Insurance Fund ("DIF") to expanded deposit insurance liability and create operational complexities if these types of deposits were treated as insured. The purpose of the Final Rule is to protect the DIF against the liability that it would otherwise face as a potential global deposit insurer, preserve confidence in the FDIC deposit insurance system, and ensure that the FDIC can effectively carry out its critical deposit insurance functions.

DATES: The effective date of the Final Rule is [30 days from publication], 2013.

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SUPPLEMENTARY INFORMATION:

I. Background

Congress created the FDIC in 1933 to end the banking crisis experienced during the Great Depression, to maintain stability and public confidence in the nation's financial system, and to safeguard bank deposits through deposit insurance. If a bank fails, the FDIC pays out deposit insurance from the DIF, which is funded by assessments on IDIs. In the most recent financial crisis, the FDIC's deposit insurance guarantee, with its backing by the full faith and credit of the United States Government, contributed significantly to financial stability in an otherwise unstable financial environment. In the FDIC's history, no depositor has ever lost a penny of an insured deposit.

The Federal Deposit Insurance Act ("FDI Act")[1] mandates the payment of deposit insurance "as soon as possible" to reduce the economic disruptions caused by bank failures and to preserve stability in the financial markets of the United States.[2] The FDIC generally pays out deposit insurance on the next business day after a bank failure, and insured depositors often have uninterrupted access to their insured deposits through ATMs and other means. The prompt payment of deposit insurance preserves confidence in the deposit insurance system and promotes financial stability. Prompt payment depends on a number of key factors, including the FDIC's

[1] 12 U.S.C. 1811, *et seq.*

[2] *See* FDI Act section 11(f)(1), 12 U.S.C. 1821(f)(1).

having immediate access to the deposit records of a failed bank and clarity about the application of laws and practices that could affect deposits in a particular location.

A. Definition of "Deposit"

The term "deposit" is defined in section 3(*l*) of the FDI Act.[3] Since the establishment of the FDIC in 1933, Congress has made distinctions between domestic and foreign deposits. The current statutory definition of "deposit" under section 3(*l*) makes clear that foreign branch deposits are not "deposits" for any purpose under the FDI Act, except under certain prescribed circumstances. In relevant part, the law specifies that "any obligation of a depository institution which is carried on the books and records of an office of such bank or savings association located outside of any State" shall not be a deposit for any of the purposes of the FDI Act or be included as part of the total deposits or of an insured deposit, "unless – (i) such obligation would be a deposit if it were carried on the books and records of the depository institution, and would be payable at, an office located in any State; and (ii) the contract evidencing the obligation provides by express terms, and not by implication, for payment at an office of the depository institution located in any State."[4]

Therefore, deposit obligations carried on the books and records of a foreign branch of a U.S. bank that would otherwise fall within one of the categories of deposits created by section 3(*l*) are *not* deposits unless they (1) would be deposits if carried on the books and records of the IDI in the United States and (2) are expressly payable in the United States.[5]

The vast majority of deposit agreements governing relationships between U.S. banks and their foreign branch depositors have to date not expressly provided for payment of foreign

[3] 12 U.S.C. 1813(*l*).

[4] FDI Act section 3(*l*)(5), 12 U.S.C. 1813(*l*)(5).

[5] *Id.* The FDI Act provides that the FDIC Board may prescribe a deposit by regulation.

branch deposits at an office in the United States. Accordingly, these foreign branch deposits would not qualify as "deposits" for any purpose under the FDI Act, including deposit insurance and the priority regime for the distribution of a failed bank's receivership assets, known as "depositor preference," as further discussed below. While "deposit" has a defined legal meaning under the FDI Act, for ease of reference, these obligations in foreign branches will generally be called "foreign branch deposits" in this Final Rule.

B. National Depositor Preference

When a U.S. bank fails, uninsured depositors share in the proceeds from the liquidation of the failed bank's assets. In 1993, Congress amended the FDI Act to establish a system of depositor preference in failed-bank resolutions.[6] In general, "depositor preference" refers to a resolution distribution regime in which the claims of depositors have priority over (that is, are satisfied before) the claims of general unsecured creditors.

Under this regime, set forth in section 11(d)(11) of the FDI Act, the receiver of a failed bank distributes amounts realized from its liquidation to pay claims in the following order of priority.[7] Administrative expenses of the receiver are reimbursed first.[8] Any "deposit liability" is reimbursed next, followed in order by general or senior liabilities, subordinated liabilities, and obligations to shareholders. The term "deposit liability" in section 11(d)(11) is not defined.

C. The 1994 Advisory Opinion

Shortly after Congress added the national depositor preference provisions, the FDIC's Acting General Counsel was asked whether the term "deposit liability" would include deposit

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[6] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

[7] 12 U.S.C. 1821(d)(11).

[8] Secured creditors' claims are satisfied to the extent of their security.

obligations payable *solely* at a foreign branch of a U.S. bank.[9] As described in the Acting General Counsel's 1994 Advisory Opinion ("General Counsel Advisory Opinion 94-1"), national depositor preference makes general unsecured creditor claims subordinate to any "deposit liability" of the institution. General Counsel Advisory Opinion 94-1 concluded that the term "deposit liability" should be defined with reference to "deposit" under section 3(*l*) of the FDI Act, which excluded, for any purpose, any obligation of a bank payable only at an office of that bank located outside the United States.[10]

Under the interpretation set forth in General Counsel Advisory Opinion 94-1, "deposit liability" for purposes of national depositor preference includes only deposits payable in the United States and excludes obligations payable solely at a foreign branch of a U.S. bank. Accordingly, an obligation in a foreign branch of a U.S. bank has not been considered a "deposit liability" for purposes of the national depositor preference provisions of section 11(d)(11) of the FDI Act. Thus, if a U.S. bank were to fail, its foreign branch depositors would share in the distribution of the bank's liquidated assets as general creditors after the claims of uninsured domestic depositors and the FDIC as subrogee of insured depositors have been satisfied.[11] If a foreign branch deposit of a U.S. bank were expressly payable at an office of the bank in the United States, however, that deposit would be treated equally with uninsured domestic deposits in the depositor preference regime.

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[9] *See* FDIC Advisory Opinion 94-1, Letter of Acting General Counsel Douglas H. Jones (Feb. 28, 1994).

[10] Section 3(*l*) was later amended to specify that an obligation carried on the books and records of a foreign office of a U.S. bank would not be a "deposit" for any purpose unless it were payable at an office located in the United States and the contract evidencing the obligation expressly provided for such payment and met other criteria. Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103-325 (1994), section 326(b)(2).

[11] While section 41 of the FDI Act, 12 U.S.C. 1831r, generally prohibits the FDIC in its corporate capacity and other agencies from making any payment that would satisfy any claim against a bank for foreign branch deposits, the FDIC as *receiver* of a failed bank may make payments from the receivership estate to satisfy such claims.

D. Foreign Branch Deposits of U.S. Banks

Many U.S. banks currently operate through branches in foreign countries, often to provide banking, foreign currency and payment services to multinational corporations. Foreign branch deposits have doubled since 2001 and total approximately $1 trillion today. In many cases, these branches do not engage in retail deposit taking or other retail banking services. Often, their typical depositors are large businesses that choose to bank in a foreign branch of a U.S. bank under deposit agreements governed by non-U.S. law to take advantage of a large bank's multi-country branch network, which allows the transfer of funds to and from branch offices located in different countries and in different time zones.

Currently, the overwhelming majority of the foreign branch deposits of U.S. banks are payable only outside the United States. In the past, making deposits in foreign branches dually payable would have been costly to U.S. banks for several reasons. First, dually payable deposits would have increased a bank's deposit insurance assessment base (which, in the past, excluded deposits payable solely outside the United States) and, therefore, its deposit insurance assessment. Second, the dually payable deposits would have become subject to the Federal Reserve's Regulation D.[12] Third, U.S. banks may have refrained from making foreign deposits dually payable out of concern that doing so could cause them to lose the protection from sovereign risk accorded them under section 25(c) of the Federal Reserve Act.[13]

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[12] 12 C.F.R. Part 204. Regulation D imposes uniform reserve requirements on all depository institutions with transaction accounts or non-personal time deposits.

[13] 12 U.S.C. 633. This section provides that a member bank is not required to repay a deposit in a foreign branch if it cannot do so because of "war, insurrection, or civil strife" or actions taken by the foreign government, unless the member bank has explicitly agreed in writing to repay foreign deposits in such circumstances.

Recent events have reduced the cost of making foreign deposits dually payable. First, in section 331(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[14] Congress changed the deposit insurance assessment base so that it now in effect covers all liabilities, including foreign branch deposits. Thus, a U.S. bank's use of dual payability would no longer increase a bank's assessment base or deposit insurance assessment. Second, the Federal Reserve now pays interest on reserves and allows more flexibility with respect to the reserves it requires. Finally, as discussed below, nothing in this Final Rule is intended to preclude a U.S. bank from protecting itself against sovereign risk.

E. The U.K. PRA Consultation Paper

In September 2012, the U.K. PRA published a Consultation Paper addressing the implications of national depositor preference regimes in countries outside the European Economic Area ("EEA"). The Consultation Paper proposes to prohibit banks from non-EEA countries, including U.S. banks, from operating deposit-taking branches in the United Kingdom unless U.K. depositors in those branches would be on an equal footing in the national depositor preference regime with domestic (uninsured) depositors in a failure resolution of the bank. A significant percentage of foreign branch deposits of U.S. banks are located in the United Kingdom and would be subject to this requirement.

The Consultation Paper proposes several options to ensure that depositors in U.K. branches would be treated equally in the event of a multinational bank's resolution. U.S. banks with branches in the United Kingdom could comply in one of these ways. First, the U.S. bank could accept deposits in the United Kingdom using a U.K.-incorporated subsidiary. Second, U.S. banks could create a trust arrangement to segregate assets of the U.K. branch to meet its

[14] Pub. L. No. 111-203, 124 Stat. 1538.

deposit liabilities, under which the trust would specify the U.K. branch depositors as beneficiaries of the trust. Third, U.S. banks could take other actions to comply, such as making their U.K. deposits payable both in the United States and in the United Kingdom. The Consultation Paper indicates that dual payability should allow U.K. depositors to participate in the preference given to home country (that is, United States) depositors in the resolution of a U.S. bank. The U.K. PRA is still considering comments on the Consultation Paper and has not provided a date by which the requirements proposed in the Consultation Paper will be implemented.

F. Notice of Proposed Rulemaking

In light of the U.K. PRA's proposal and subsequent action required of U.S. banks with branches in the United Kingdom, the FDIC proposed to amend its deposit insurance regulations with respect to deposits payable in branches of U.S. banks located outside the United States. On February 19, 2013, the FDIC published in the Federal Register and invited public comment on a Notice of Proposed Rulemaking: Deposit Insurance Regulations; Definition of Insured Deposit (the "Proposed Rule").[15] The Proposed Rule proposed to amend the FDIC's deposit insurance regulations to clarify that deposits in foreign branches of U.S. banks are not FDIC-insured deposits. The FDIC is now adopting as final the proposed amendments to its deposit insurance regulations, 12 C.F.R. Part 330, section 330.3(e), with minor technical changes.

II. Statutory Framework

A. Definition of "Insured Deposit"

[15] 78 Fed. Reg. 11,604 (February 19, 2013).

The Final Rule clarifies that foreign branch deposits are not insured deposits for purposes of the FDI Act, regardless of the location at which the deposit is payable. The FDI Act defines "insured deposit" as the net amount due any depositor for deposits in an insured depository institution as determined under section 11(a) of the FDI Act.[16] Section 11(a) of the FDI Act,[17] cross-referenced in the definition of "insured deposit," instructs the FDIC to "insure the deposits of all insured depository institutions as provided in this Act," but does not expressly address foreign deposits. The FDI Act definition of "deposit" in section 3(*l*)(5)(A) makes clear that obligations carried on the books and records of an office located outside the United States *shall not* be deposits for *any* purpose under the FDI Act, but it does not address whether they *must* be considered deposits for *all purposes,* including for purposes of deposit insurance, if they would qualify as deposits under 3(*l*)(5)(A) because they are payable at an office within the United States under express contractual terms.

B. Rulemaking Authority

The FDIC issues rules and regulations necessary to carry out the statutory mandates of the FDI Act and other laws that the FDIC is charged with administering or enforcing. In instances such as this one where a statute is silent or general in nature on issues critical to the FDIC's fundamental responsibilities, the FDIC has used its rulemaking authority to effectuate its statutory duties.

Providing deposit insurance to IDIs and maintaining public confidence in the banking system through deposit insurance in the event of a U.S. bank's insolvency are two central functions of the FDIC. In order to permit the FDIC to carry out these functions successfully, the

[16] FDI Act section 3(m)(1), 12 U.S.C. 1813(m)(1).

[17] 12 U.S.C. 1821(a).

FDIC is authorized to undertake rulemaking to implement the FDI Act effectively, particularly with respect to its deposit insurance functions. The FDI Act gives the FDIC explicit rulemaking and definitional authorities to ensure that it can adapt to changed circumstances as necessary to carry out its deposit insurance responsibilities.

The FDI Act contains several provisions granting the FDIC authority to issue regulations to carry out its core functions and responsibilities, which include the duty "to insure the deposits of all insured depository institutions." Notably, FDI Act section 11(d)(4)(B)(iv) authorizes the FDIC to promulgate "such regulations as may be necessary to assure that the requirements of this section [FDI Act section 11, which addresses, in section 11(f) the payment of deposit insurance] can be implemented with respect to each insured depository institution in the event of its insolvency."[18]

Other grants of FDIC rulemaking authority can be found in FDI Act section 9(a)(Tenth) (authorizing the FDIC Board to prescribe "such rules and regulations as it may deem necessary to carry out the provisions of this chapter . . . ") and FDI Act section 10(g) (authorizing the FDIC to "prescribe regulations" and "to define terms as necessary to carry out" the FDI Act).[19]

III. Summary of Comments in Response to Proposed Rule

As noted above, the FDIC solicited public comment on the Proposed Rule on February 19, 2013. The comment period ended on April 22, 2013. The FDIC received comments from three industry groups and two individuals in response to the Proposed Rule. After careful consideration of the comments, the FDIC is adopting the Proposed Rule as final, with technical format changes.

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[18] 12 U.S.C. 1821(d)(4)(B)(iv).

[19] 12 U.S.C. 1819(a)(Tenth); 1820(g).

A. Comments in Response to Proposed Rule

Overall, commenters did not object to the concept that foreign branch deposits are not insured, as clarified in the Proposed Rule. One individual acknowledged that the Proposed Rule would limit the DIF's exposure, but argued that it would adversely affect public relations. The commenter suggested that foreign deposits be insured up to the domestic limit, with U.S. banks with foreign branches paying double their current assessments in order to strengthen the DIF. However, the FDIC believes that it is inconsistent with congressional intent and the FDIC's statutory mandate of promoting confidence in the U.S. banking system to insure foreign deposits in the manner the commenter proposed. The FDIC believes that the better approach is to make clear that foreign branch deposits, whether or not deposit liabilities for the purpose of national depositor preference, are not "insured deposits."

Commenters did not object to the Proposed Rule itself, but most of the commenters raised several issues related to risks they assert would result if U.S. banks employed dual payability to satisfy the U.K. PRA requirement to treat domestic and foreign branch deposits equally. These commenters advocated an alternative approach, which they believe would better address their concerns. The FDIC has carefully considered their comments and discusses them below.

B. Section 11(d)(11) Approach

Instead of adopting the FDIC's Proposed Rule, the commenters suggested that the FDIC formally interpret "deposit liability" for purposes of the depositor preference regime in section 11(d)(11) of the FDI Act, to include all deposits of a U.S. bank, wherever payable (the "section 11(d)(11) approach"). According to the commenters, this alternative would achieve the result of equal treatment of uninsured domestic deposits and foreign branch deposits in the event of a U.S.

bank's resolution without creating global liability for the DIF. They also argued that this would eliminate the risk of litigation over depositor preference, as well as reduce the risk of litigation by foreign depositors over deposit insurance because banks would be less likely to employ dual payability. Alternatively, commenters suggested a "combined approach" in which a formal interpretation of "deposit liability" could be issued in addition to a rule clarifying that deposits in foreign branches are not insured, even if they are also payable at a U.S. branch.

The commenters acknowledged that the proposed alternative would contradict FDIC General Counsel Advisory Opinion 94-1, but they argued that their interpretation of "deposit liability" is supported by the plain meaning of the term deposit liability, its uses elsewhere in the FDI Act, legislative history, and reference to state law priority regimes. They further argued that the depositor preference provision in the FDI Act does not distinguish among depositors because it accords priority to any "deposit liability."

Commenters argued that the term "deposit liability" in the FDI Act should not be bound by the Act's definition of "deposit." They cite to a canon of statutory construction that suggests that where Congress chooses to use two different terms, they are intended to have two different meanings. Commenters argued that the term "deposit liability" is used elsewhere in the FDI Act to suggest a broader definition than the term "deposit," from which foreign deposit obligations are excluded. They contended that there is legislative history supporting the notion that Congress did not intend to distinguish between foreign and domestic depositors under the depositor preference provisions of the FDI Act. In particular, these commenters pointed to congressional committees which used broad and general language to describe depositor preference. Moreover, the commenters suggested that Congress intended to follow state depositor preference statutes, and that one of these states specifically included foreign branch

deposits in its depositor preference statute, while the majority of other states with depositor preference statutes did not refer to foreign deposits specifically, but referred to deposits in a broad and general manner.

From a practical standpoint, several commenters noted that the section (11)(d)(11) approach is also consistent with current bank reporting requirements. For instance, deposit liabilities on a bank's balance sheet would include all deposits, domestic and foreign. Similarly, the general instructions for Schedule RC-E to the Consolidated Reports of Condition and Income ("Call Report"), which all insured depository institutions must file, refer to both domestic and foreign branch deposits as "deposit liabilities." The Call Report also requires foreign deposits to be reported as "deposit liabilities."

According to these commenters, the approach of reinterpreting "deposit liability" as used in section 11(d)(11) not only bolsters international cooperation, but also eliminates the potential for inconsistent treatment of deposits in different foreign jurisdictions. They argued that the section 11(d)(11) approach would be compatible with the FSB's Key Attributes and the most recent draft of the European Commission's proposed Resolution and Recovery Directive. It would also eliminate potential risks and costs to the FDIC and the ongoing need for guidance to banks, foreign depositors, and foreign regulators on how dual payability would work.

Ultimately, commenters argued that the section 11(d)(11) approach would better address industry concerns about ensuring equal treatment of depositors under the U.S. depositor preference regime in a liquidation than if U.S. banks were to change their deposit agreements to make foreign branch deposits dually payable. The commenters contended that the FDIC would be justified in changing its previous position, set forth in General Counsel Advisory Opinion 94-1, by adopting their proposed approach under section 11(d)(11) of the FDI Act. According to the

commenters, General Counsel Advisory Opinion 94-1 reached its conclusion without sufficient substantive discussion. Furthermore, they noted that General Counsel Advisory Opinion 94-1 was not a binding interpretation approved by the FDIC Board of Directors and would therefore not be entitled to significant deference.

The FDIC believes that formally interpreting "deposit liability" as the commenters proposed would be inconsistent with current statutory language, and as commenters acknowledged, would overturn a longstanding Advisory Opinion. General Counsel Advisory Opinion 94-1 is based on a reasonable interpretation of the FDI Act. While the term "deposit liability" is not defined in the FDI Act, the definition of "deposit" under section 3(*l*) explicitly refers to the term "deposit liabilities." In addition, the legislative history of the depositor preference provision does not define "deposit liability" under section 11(d)(11) and does not explicitly include foreign branch deposits in the class of depositors who are entitled to depositor preference.[20] The FDI Act does allow a deposit in a foreign branch of a U.S. bank to receive depositor preference, but only under the circumstances specifically stated in the statute; that is, the deposit must be dually payable.

C. Comments Relating to Dual Payability

The commenters also presented a number of arguments related to the negative consequences that would result if they employ dual payability, in support of their proposed alternative approach. These arguments include contentions that:

- In the future, other foreign financial regulators might not allow banks to use dual payability as an acceptable means to ensure equal treatment of domestic and foreign branch deposits.

[20] *See* House Budget Committee Report, H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 1993 at 87, 1993 U.S.C.C.A.N. 378, 462 (May 25, 1993).

- The Proposed Rule would weaken efforts to facilitate international cooperation for cross-border resolution.
- It is unclear whether a U.S. bank with foreign branches would retain the protections of section 25C of the Federal Reserve Act on its dually payable deposits.
- Bank resolutions would become more complex and burdensome for the FDIC under the Proposed Rule if U.S. banks made deposits dually payable.
- Banks would incur significant operational and administrative expenses if they employed dual payability to satisfy the U.K. PRA.
- Both retail customers and multinational corporate depositors would also be confused about changes to their deposit contracts and the implications of dually payable deposits.

Finally, some commenters argued that the section 11(d)(11) approach would eliminate the litigation risk to the FDIC that they believe could occur under the Proposed Rule. The commenters contended that the terms "deposit" and "insured deposit" are equivalent. Under this interpretation, a dually payable foreign branch deposit would also be an "insured deposit" under section 3(m).[21]

The FDIC is cognizant of the fact that the industry considers dual payability and the other options that the U.K. PRA suggested for compliance with the Consultation Paper to be undesirable for a variety of reasons. Without expressing an opinion as to the merits of the commenters' various policy arguments in support of the section 11(d)(11) approach, the FDIC believes that their proposed approach is inconsistent with current statutory language, as discussed above. However, the FDIC does have authority to adopt this Final Rule. The FDIC is authorized under the FDI Act to issue regulations and has used its rulemaking authority in the past to address the conditions under which it will insure deposits and believes it may use that

[21] 12 U.S.C. 1813(m).

authority in a similar manner to address the insurance status of foreign branch deposits.[22] Ultimately, the Final Rule only clarifies that foreign branch deposits are not insured, a concept to which commenters were not opposed. The Final Rule does not affect the ability to employ dual payability to comply with the U.K. PRA, which is an option under current law for U.S. banks.

D. Other Comments

The FDIC sought comment on whether it should consider another option that would not entirely preclude deposit insurance for dually payable deposits, but only if enumerated conditions designed to protect the DIF and facilitate deposit insurance determinations were satisfied. The FDIC did not receive any comments addressing this alternative.

The FDIC also requested comment on the Proposed Rule's effect on deposits at Overseas Military Banking Facilities located on Department of Defense installations or similar facilities or programs authorized under Federal statute. The FDIC did not receive any comments in response to this request.

While not a formal comment in response to the Proposed Rule, the FDIC received an inquiry on the deposit insurance status of a former member of the Trust Territory of the Pacific Islands.

IV. Description of the Final Rule

A. Overview

The Final Rule amends the deposit insurance regulations, 12 C.F.R. Part 330, section 330.3(e), as they relate to deposits payable outside of the United States. The Final Rule states explicitly that an obligation of an IDI that is carried on the books and records of a foreign branch

[22] FDI Act sections 11(d)(4)(B)(iv), 12 U.S.C. 1821(d)(4)(B)(iv); 9(a)(Tenth), 12 U.S.C. 1819(a)(Tenth); 10(g), 12 U.S.C. 1820(g); *see, e.g.*, Unlimited Coverage for Noninterest-Bearing Transaction Accounts, 75 Fed. Reg. 69,577 (Nov. 15, 2010) (codified at 12 C.F.R. pt. 330); Permanent Increase in Standard Coverage Amount, 75 Fed. Reg. 49,363 (Aug. 10, 2010) (codified at 12 C.F.R. pt. 330).

of a U.S. bank shall not be an insured deposit for the purposes of the deposit insurance regulations, even if the obligation is also payable at an office within the United States. This ensures that the FDIC will be able to fulfill its statutory mission and protect the DIF from potential global liability.

The Final Rule would not affect the ability of a U.S. bank to make a foreign deposit dually payable. Should a bank do so, its foreign branch deposits would be treated as deposit liabilities under the FDI Act's depositor preference regime in the same way as, and on an equal footing with, domestic uninsured deposits.

The Final Rule clarifies that it does not affect the operation of Overseas Military Banking Facilities operated under Department of Defense regulations, 32 C.F.R. Parts 230 and 231, or similar facilities authorized under Federal statute. These types of facilities are established under statutory authority, separate from State or Federal laws that govern the broader banking industry, for the benefit of specific U.S. persons. These include active duty and reserve U.S. military personnel, Department of Defense U.S. civilian employees, and U.S. employees of other U.S. government departments stationed abroad. Consistent with this approach, an U.S. Overseas Military Banking Facility located in a foreign country has been treated as a domestic office for purposes of the Call Report. Accordingly, deposits placed at these facilities overseas would not be affected by this Final Rule and would continue to receive FDIC deposit insurance if they meet the definition of "deposit" in section 3(*l*) of the FDI Act.[23]

As noted above, the FDIC received an inquiry about the intended effect of the Proposed Rule on one of the former members of the Trust Territory of the Pacific Islands. The Final Rule

[23] 12 U.S.C. 1813(*l*); *see* FDIC Advisory Opinion 96-6, Letter of Assistant General Counsel Alan J. Kaplan (Mar. 5, 1996).

is not intended to affect the status of insured deposits, if any, in depository institutions located in any of the former members.[24]

The Final Rule also makes a technical change in section 330.3(e) to streamline the regulation by incorporating the definition of "State" under the FDI Act.[25]

B. Objective of the Final Rule

The Final Rule addresses several key concerns: (1) maintaining public confidence in the nation's financial system; (2) protecting the DIF; (3) ensuring that, in the event of a U.S. bank's insolvency, the FDIC is in a position to effectively administer deposit insurance payments; and (4) addressing global financial issues of importance to the deposit insurance system and the banking public.

The goal of the Final Rule is to ensure that the FDIC can carry out its mandate to provide deposit insurance and to protect the DIF. Absent this rulemaking, the extension of deposit insurance to foreign branch deposits could potentially compromise the DIF, and by implication, the U.S. Government, which provides a full faith and credit backing to the deposit insurance guarantee. This threat is aggravated by the higher deposit insurance limits the FDIC provides in contrast with the deposit insurance systems of many other countries. There is no indication that Congress ever intended the DIF to have global liability.

Moreover, by its very nature, performing a deposit insurance determination for deposits in foreign branches could compromise the FDIC's ability to make timely deposit insurance

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[24] Micronesia, the Marshall Islands, and Palau, formerly among the members of the Trust Territory of the Pacific Islands, are independent countries. The FDI Act refers to the Trust Territory of the Pacific Islands, but the trusteeship of its former members has been terminated. *See* section 3(a)(3), 12 U.S.C. 1813(a)(3).

[25] *Id.* The term "State" means any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands.

payments. The FDI Act directs the FDIC to pay deposit insurance "as soon as possible."[26] The FDIC usually makes this prompt payment by the next business day after a closing, and the timely payment of deposit insurance plays a key role in promoting depositor confidence in the U.S. deposit insurance system and stability in the banking industry.

The FDIC would likely face obstacles in trying to satisfy this statutory obligation when dealing with deposits in foreign branches. These challenges could include interference with the FDIC's prompt and unfettered access to books and records of the foreign branch and being forced to deal with the impact of the local law applicable to the branch, including the appropriate role of the foreign jurisdiction's regulatory authorities. In an extreme case, for example, FDIC representatives might be unable to obtain visas or other travel permits to enter the foreign jurisdiction. Even if full access to the foreign branch's premises and deposit records were provided to the FDIC, access could be delayed for an indeterminate period of time. Further, operational issues could not only impede the FDIC's prompt payment of deposit insurance to depositors of foreign branches of failed U.S. banks, but could also aggravate a financial crisis that transcends national borders.

C. Section-by-Section Analysis of the Final Rule

The Final Rule makes three changes to the deposit insurance rules. First, it adds to the current list of authorities two additional statutory references: FDI Act section 10(g) and FDI Act section 11(d).[27] Next, the Final Rule amends the definition of "insured deposit" in section 330.1(i) of Part 330 to add the phrase "and this part" to the existing definition.

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[26] Section 11(f)(1), 12 U.S.C. 1821(f)(1).

[27] 12 U.S.C. 1820(g); 12 U.S.C. 1821(d).

Lastly, in section 330.3(e), which deals with "General Principles," the Final Rule amends the existing text relating to "Deposits payable solely outside of the United States and certain other locations." The Final Rule strikes "solely" from the subsection heading and makes the existing text the first of three paragraphs. The Final Rule also makes a technical change to the existing text by substituting "any State" for "the States of the United States, the District of Columbia, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands." This amendment streamlines the regulation by incorporating the definition of "State" under the FDI Act.

The second paragraph clarifies that any deposit carried on the books and records of an office of a U.S. bank located outside any State, regardless of where payable – that is, even if dually payable – is not an insured deposit. In the third paragraph the Final Rule establishes, by rule of construction, that Overseas Military Banking Facilities operated under Department of Defense regulations, 32 C.F.R. Parts 230 and 231, are not to be considered as located outside any State, as defined in section 3(a)(3) of the FDI Act.

V. Summary Evaluation

In identifying the need to clarify that deposits in foreign branches of U.S. banks are not FDIC-insured deposits, the FDIC has evaluated legally available and viable alternatives, as well as the benefits and costs associated with such alternatives, based on available information. The Final Rule is consistent with statutory authority and objectives and would achieve the FDIC's mission of maintaining stability and public confidence in the nation's financial system by insuring deposits. It would also help ensure the FDIC's ability to administer a failed U.S. bank's receivership. Further, the Final Rule would benefit the public by clarifying the treatment of

foreign branch deposits during a resolution and by limiting the exposure to the DIF that could occur as a result of changes in the requirements for U.S. banks to operate in foreign countries.

The FDIC seeks to minimize to the extent practicable the burdens which the Final Rule could impose on the banking industry and the public. While the FDIC recognizes that some U.S. banks may employ dual payability for their foreign branch deposits to address the U.K. proposal, the final rule does not change this avenue available under current law. Therefore, based on available information, the FDIC believes that the Final Rule itself would not impose any additional costs on the banking industry or the public.

VI. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501, *et seq.*, the FDIC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget ("OMB") control number. The Final Rule clarifies that deposit insurance is not available for deposits in foreign branches of U.S. banks. It does not require any new collections of information as contemplated by the PRA. Consequently, no information has been submitted to the Office of Management and Budget for review. If a future modification to the Call Report is warranted, it would be issued separately and published in the *Federal Register* for notice and comment.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601, *et seq.*, requires each Federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a

substantial number of small entities.[28] The RFA provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the proposed rule will not have a significant impact on a substantial number of small entities.

Pursuant to Section 605(b) of the RFA, the FDIC certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities. The Final Rule specifies that deposit insurance is inapplicable to deposits in foreign branches of U.S. banks. Using reports of condition and income and FFIEC form 030 reports filed within recent years, the FDIC has been able to identify only one bank that is considered a small entity for the purposes of the RFA that has a foreign branch and, thus, could be affected by the Final Rule. The Final Rule, however, imposes no burdens on IDIs of any size because it clarifies only that foreign branch deposits are not insured and does not require any action on the part of U.S. banks.

[*C. Small Business Regulatory Enforcement Fairness Act*

The Office of Management and Budget has determined that the Final Rule is not a "major rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), 5 U.S.C. 801 *et seq.* As SBREFA requires, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.]

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106-102, 113 Stat. 1338, 1471) requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Final Rule in a simple and straightforward manner.

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[28] *See* 5 U.S.C. 603, 604 and 605.

List of Subjects in 12 C.F.R. Part 330

Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Savings and Loan associations, Trusts and trustees.

■ For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend part 330 of title 12 of the Code of Federal Regulations as follows:

Part 330 – DEPOSIT INSURANCE COVERAGE

The authority citation for part 330 is revised to read as follows:

AUTHORITY: 12 U.S.C. 1813(*l*), 1813(m), 1817(i), 1818(q), 1819(a)(Tenth), 1820(f), 1820(g), 1821(a), 1821(d), 1822(c)

1. In § 330.1, revise paragraph (i) to read as follows:

(i) *Insured deposit* has the same meaning as that provided under section 3(m)(1) of the Act (12 U.S.C. 1813(m)(1)) and this part.

2. In § 330.3, revise paragraph (e) to read as follows:

(e) *Deposits payable outside of the United States and certain other locations.*

(1) Any obligation of an insured depository institution which is payable solely at an office of that institution located outside any State, as the term "State" is defined in section 3(a)(3) of the Act (12 U.S.C. 1813(a)(3)), is not a deposit for the purposes of this part.

(2) Except as provided in paragraph (3) of § 330.3(e), any obligation of an insured depository institution which is carried on the books and records of an office of that institution located outside any State, as referred to in paragraph (1) of § 330.3(e), shall not be an insured deposit for purposes of this part, or any other provision of this part, notwithstanding that the obligation may also be payable at an office of that institution located within any State.

(3) *Rule of Construction.*—For purposes of § 330.3(e), Overseas Military Banking Facilities operated under Department of Defense regulations, 32 C.F.R. Parts 230 and 231, are not considered to be offices located outside any State, as referred to in paragraph (1) of § 330.3(e).

By order of the Board of Directors.

Dated at Washington, D.C., this ___ day of_____, 2013

FEDERAL DEPOSIT INSURANCE CORPORATION

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Robert E. Feldman

Executive Secretary

(Seal)